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IN THE SUPREME COURT FOR THE STATE OF IDAHO

JUDY THOMPSON, Claimant, Appellant, vs. CLEAR SPRINGS FOODS, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORP., Surety, Defendants, Respondents.	)	Supreme Court No. 36159 **RESPONDENT'S RESPONSIVE BRIEF**

RESPONDENT'S BRIEF

APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

R.D. MAYNARD, CHAIRMAN

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Attorney for Respondent.

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STATEMENT OF THE CASE

Appellant, Judy Thompson ("Claimant"), is represented by Dennis R. Peterson of Idaho Falls, Idaho. Respondents-Defendants, Clear Springs Foods, Inc. ("Clear Springs" or "Employer") and Liberty Northwest Insurance Co. ("LNW" or "Surety"), are represented by E. Scott Harmon of Boise, Idaho.

Hearing before the Industrial Commission ("Commission") was held on September 24, 2008 before Commission Referee Michael E. Powers on the bifurcated issue of whether injuries sustained by Claimant as a result of an alleged slip and fall accident on January 31, 2008 arose out of and in the course of Claimant's employment with Clear Springs. Following hearing, neither party undertook additional depositions. Claimant filed her Opening Brief and Defendants Responded. Claimant waived filing of a Reply Brief. Upon the record introduced at hearing and upon the briefing provided by the parties, Referee Powers issued his Findings of Fact, Conclusions of Law and Recommendations on January 14, 2009. By Order of the following day, January 15, 2009, the Commission proper unanimously approved, confirmed and adopted Referee Powers' findings of fact and conclusions of law as its own. Referee Powers and the Commission both specifically found that, as a matter of fact, Claimant's alleged accident and injury had not arisen out of and in the course of her employment.

Claimant did not file a Request for Reconsideration with the Commission and this appeal followed.

STATEMENT OF THE FACTS

On the date of hearing before the Commission, Claimant was 53 years old. *Tr. 15: 19-21.* She had worked in Employer's packaging department for approximately 12 years. *Tr. 16: 1-6.*

On January 31, 2008, Claimant went to work at or about her normal 10:00 a.m. start time. *Tr. 16: 23-25, Ex. G, 145.* As one might except for late January in the Magic Valley, there was snow on the ground from earlier flurries. *Tr. 17: 16-19.* Claimant parked her car in the employer-provided parking lot adjacent to the production facility. *Tr. 17: 23 – 18: 10; Ex. G, 146, 428.*

During her afternoon break, Claimant departed the employer's premises to move her vehicle from the employer-provided parking lot to a wide spot on a county road approximately 140 yards away. *Tr. 27: 3-14; 51: 20-52: 2.* Contrary to company policy, Claimant had neither sought permission of her supervisor before leaving Clear Springs premises nor had she clocked out. *Ex. G, 145, 152; Tr. 43: 5-12.* Claimant was reprimanded for this violation of company policy. *Ex. G*, 147; *Tr. 44: 4-8.*

While returning to her employer's place of business, but while still off her employer's premises, Claimant asserts she slipped and fell on the icy roadway, sustaining injury to her shoulder. *Tr. 31: 19-23, 32: 21-33: 1; 53: 7-14.*[1]

[1] The Referee had clear concerns regarding Claimant's purported fall and how a fall as Claimant describes, under these circumstances, could have occurred. *Tr. 45: 12 – 46: 8.* Those questions are, though, beyond the very narrow scope of the bifurcated issue before the Commission and the even narrower issue now before this Court.

On returning to her employer's premises, Claimant notified her Lead, Kathy Henson, and Production Manager, Kris Henna, of the off premises slip and fall. *Tr. 34: 18-19; 49: 13-21.*

Clear Springs has in place a procedure by which employees are allowed to travel through a nearby gated community to avoid the hill just outside the employer's parking lot when weather conditions so warrant. *Tr. 54: 15-25.* Such arrangements were not needed on January 31, 2008, the date of Claimant's asserted slip and fall. *Tr. 73: 15-25.*

Claimant subsequently sought medical care for injuries sustained in the allegedly work related accident and injury. *Def. Ex. D:10-14; Def. Ex. F:117-143; Def. Ex. H.*

ISSUES ON APPEAL

The sole issue before the Court is whether, upon the record developed at hearing, there is substantial and competent evidence to support the Commission's factual determination that Claimant's alleged accident and resulting injury did not arise out of or in the course of her employment with Clear Springs.

ARGUMENT

A. RELEVANT LAW

Relying upon the former Idaho Code §72-17(a) (now, §72-18(a)), this Court has established clear requirements for a Claimant seeking benefits under Idaho's

Worker's Compensation Law. In *Dinius v. Loving Care and More, Inc.*, 133 Idaho 572, 574, 900 P.2d 738, 740 (1999), the Court recited:

> The applicable standard for determining whether an employee is entitled to compensation under the Worker's Compensation Act requires that the injury must have been caused by an accident "arising out of and in the course of employment."

Claimant carries the burden of proving both that she was injured and that "the injury was the result of an accident arising out of and in the course of employment." *Seamans v. Maaco Auto Painting and Body Works*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996) (citing *Neufeld v. Browning Farris Indus.*, 109 Idaho 899, 902, 712 P.2d 600, 603 (1985)).

> A worker receives an injury in the course of employment, if the worker is doing the duty that the worker is employed to perform. (*citations omitted*) This prong of the test, therefore, examines the time, place, and circumstances under which the accident occurred.

Kessler ex rel. Kessler v. Payette County, 129 Idaho 855, 859, 934 P.2d 28, 32 (1997).

> An injury is considered to arise out of employment when a causal connection exists between the circumstances under which the work must be performed and the injury of which the claimant complains. (*citations omitted*) This prong of the compensability test examines the origin and cause of the accident.

Id.at 860, 934 P.2d at 33.

The standard of review long applied by this Court in an appeal such as this is similarly well and concisely set forth *Kessler, supra:*

> It is particularly important to note that **whether an injury arose out of and in the course of employment is a question of fact** to be decided by the Commission. *Reinstein v. McGregor Land & Livestock Co.,* 126 Idaho 156, 879 P.2d 1089 (1994). Although this Court may review the Commission's factual findings, this Court

> must limit its review to determining whether the Commission correctly denied benefits after it applied the law to the relevant facts. *Morgan v. Columbia Helicopters, Inc.*, 118 Idaho 347, 796 P.2d 1020 (1990). **This Court may not set aside findings of fact that are supported by substantial competent, although conflicting, evidence**, *see* I.C. § 72-732(1); *Gradwohl v. J.R. Simplot Co.*, 96 Idaho 655, 534 P.2d 775 (1975), but may disturb the Commission's findings, if they are clearly erroneous. *Koester v. State Ins. Fund,* 124 Idaho 205, 208, 858 P.2d 744, 747 (1993). **This Court additionally may not scrutinize the weight and credibility of the evidence relied upon by the Commission but must construe the evidence in the light most favorable to the party who prevailed before the Commission**. *Darner v. Southeast Idaho In-Home Servs.*, 122 Idaho 897, 841 P.2d 427 (1992).

Kessler, 129 Idaho at 858, 934 P.2d at 31 (1997) *(Emphasis added).*

This is not a case in which the credibility of any witness or any document is at issue and, hence, this Court's analysis of the distinction between "observational credibility" and "substantive credibility" and the impact of that distinction as set forth in *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 179 P.3d 288 (2008) is not here implicated.

The Commission's decision below turns solely upon an issue this Court has identified as a question of fact; whether Claimant's alleged injuries arose out of and in the course of her employment with Clear Springs. Hence, in accordance with *Kessler, supra*, the only determination the Court must here make is whether the Commission's findings were supported by substantial competent evidence.

> Substantial and competent evidence is relevant evidence which a reasonable mind might accept to support a conclusion. It is more than a scintilla of proof, but less than a preponderance.

Stolle v. Bennett, 144 Idaho 44, 48, 156 P.3d 545, 549 (2007) *(Internal quotations and citations omitted)*.

B. CONSTRUING EVIDENCE IN THE LIGHT MOST FAVORABLE TO RESPONDENTS, THE COMMISSION'S FACTUAL DETERMINATION BELOW THAT CLAIMANT'S ACCIDENT AND INJURY DID NOT ARISE OUT OF OR IN THE COURSE OF HER EMPLOYMENT IS BASED UPON SUBSTANTIAL AND CREDIBLE EVIDENCE.

This is not a complicated factual scenario; Claimant, solely to satisfy her personal desires and without regard to the requirements or business needs of her employer, departed her employer's premises without permission and without clocking out and undertook, upon her own, to face the risks inherent in traversing a hill on an icy country road, on foot, on the evening of January 31, 2008. Not unforeseeably, Claimant allegedly slipped on the slick incline and fell, suffering injury. The parallel between this case and the facts found in *Freeman v. Twin Falls Clinic and Hosp.*, 135 Idaho 36, 13 P.3d 867 (2000) are striking.

In *Freeman*, claimant chose to park her vehicle on the street rather than in the employer-provided parking lot. She had testified that a supervisor told her she could park on the street and that many smokers did so as it made it easier to run to the car for a cigarette on break time. Claimant further urged that it was difficult to get into and out of the employer's parking lot as other employees converged upon a narrow alleyway entering or departing the employer's parking lot. Claimant Freeman was injured when a co-worker, also seeking street parking, backed into her as she was getting out of her car. Under those facts, the Commission determined that claimant's decision to park on the public thoroughfare and not in

the employer provided parking lot did not fulfill any work related need or requirement of her employer. Thereupon, the Commission found that claimant Freeman's accident and injury did not arise out of and in the course of her employment. In affirming the Commission on appeal, this Court held that the Commission's decision was supported by substantial, competent evidence and awarded costs against appellant . *Id.* at 39, 13 P.3d at 870. Respondents believe that, given the striking parallel in the fact patterns, the Court's decision in *Freeman* informs the result here and that the result here ought be the same as in *Freeman.*

Appellant's reliance upon *Smith v. University of Idaho*, 67 Idaho 22, 170 P.2d 404 (1946) to argue for a different result here is misplaced. In *Smith*, this Court considered application of the personal comfort doctrine in the context of a girl's dormitory "housemother" who suffered injury (and, subsequently, death) resulting from a fall on a downtown Moscow sidewalk, off campus, while shopping for coffee and Christmas ornaments. There, the Court found that:

> When Mrs. Smith purchased the coffee and Christmas tree ornaments she did so for the **mutual benefit of herself and her employer**. She was at liberty and expected to use her own devices and discretion, in fact, at liberty to use any method advisable by her for the purpose of creating a congenial and homelike atmosphere among the group of girls living at the hall; to win their respect and retain their confidence; to adjust difficulties that might arise among them, and to supervise their conduct and activities, as well as their social affairs. Upon such occasions **she served refreshments, all of which was incidental or ancillary to her employment and beneficial to her employer. Her superiors recognized the mutual benefit to Mrs. Smith and the University in carrying out the policy adopted by her.**

Id. at 29, 170 P.2d at 408-9 (*emphasis added*).

The instant matter is readily distinguishable from *Smith* in that, here, the Commission found that there was no "mutual benefit" rendering Claimant's drive up or trek down the slick country road incidental or ancillary to her employment Rather, the Commission found that:

> While it may have been for Claimant's own personal comfort, there was no nexus between satisfying that personal comfort and her employment. She was not engaged, either directly or indirectly, with the duties required of her job at the time she allegedly slipped and fell. While certain personal comfort activities may be reasonably anticipated in the normal course of human affairs during a workday such as restroom breaks, eating lunch, etc., Claimant's act of moving her car off Employer's premises to the turnout could not have been. The moving of Claimant's vehicles was more than a minor or inconsequential departure from her employment.

Commission's Findings of Fact, etc. at ¶ 10.

Further, even the language quoted from *Smith* by Claimant at page 5 of her Brief operates against her. Specifically, the Court, in *Smith*, reminded that "Nor is [Claimant's] service [to her employer] interrupted when for a brief interval the worker performs a personal errand not forbidden." However, here, Claimant's departure from the employer's premises upon her own errand, without first seeking supervisory approval and clocking out, was forbidden; and Claimant was, in fact, reprimanded for that failure. *Ex. G*, 147; *Tr. 44: 4-8.*

CONCLUSION

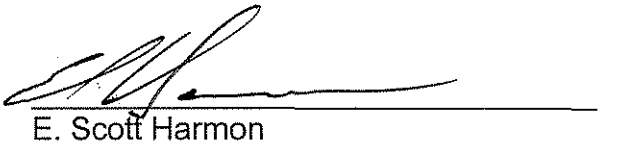
Claimant does not argue that the Commission misapplied the law in this case but, rather, simply seeks a determination from this Court substituting Claimant's determination of pivotal facts for those found by the Commission

below. Further, Claimant puts forth no argument that the Commission failed to ground its decision upon substantial and competent evidence, rather, Claimant simply seeks to have this Court re-try the underlying case and re-weigh the evidence, hoping that the Court reaches factual findings which differ from those recorded by the Commission.

Thereupon, Respondents respectfully pray this Court, applying the standard of review reiterated in *Kessler, supra*, affirm, as it did in *Freeman, supra*, the Commission's decision in this matter.

Respectfully submitted this 16th day of July, 2008.

LAW OFFICES OF HARMON,
WHITTIER & DAY



E. Scott Harmon
Attorney for Defendants-Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 16th day of July, 2008, a true and correct copy of the foregoing document was served upon the following by the method indicated:

Dennis R. Peterson
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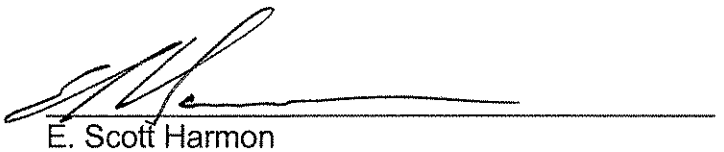

E. Scott Harmon